NO. 20676

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIXTO RODRIGUEZ-GONZALEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in a one-count indictment, following trial by jury [C. T. 10]. 1/

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United

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1/ "C. T." refers to the Clerk's Transcript of Record.

States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in a one-count indictment returned by the Federal Grand Jury for the Southern District of California. The indictment alleged that appellant, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 105 pounds of marihuana, knowing that the marihuana had been imported and brought into the United States contrary to law [C. T. 2].

Jury trial of appellant commenced on October 12, 1965, before United States District Judge Fred Kunzel [R. T. 3]. 2/ Appellant was found guilty as charged on October 14, 1965 [C. T. 10].

Thereafter, on December 7, 1965, appellant was committed to the custody of the Attorney General for seven years [C. T. 11]. Appellant subsequently filed a timely notice of appeal [C. T. 13].

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

"1. The search of the vehicle was not a border

2/ "R. T." refers to the Reporter's Transcript of Proceedings.

search and no probable cause existed for the search of the vehicle without a warrant.

"2. No probable cause existed for the arrest of the defendant without a warrant.

"3. The informant was not established as reliable.

"4. The evidence was the product of an unlawful search.

"5. The arrest of the defendant was illegal and the contraband was inadmissible in evidence.

"6. The evidence was insufficient to sustain the verdict and judgment of conviction.

"7. The court erred in failing to give the requested instruction, prejudicial to the rights of the defendant.

"8. The court erred in failing to grant the defendant's motion to suppress the evidence.

"9. The court erred in failing to grant the defendant's motion for judgment of acquittal."
[Appellant's Opening Brief, pp. 22-23].

IV

STATEMENT OF THE FACTS

A. The Motion to Dismiss.

On the night of June 10, 1965, Customs Port Investigator David F. Burnett was informed that Patricio Becerra, a well-known narcotic dealer in Tijuana, would use three automobiles to facilitate the entry of a load of marihuana into the United States from the Tijuana area. The license numbers of the three vehicles were given to Burnett [R. T. 4, 42-43].

Customs Agent Walter Gates was present at the conversation between Burnett and the informant. The informant had provided Agent Gates with accurate information in the past in regard to Tijuana dealers. On one previous occasion, in May 1965, the informant provided a license number and information resulting in the seizure of a load of marihuana coming into the United States from Mexico in a vehicle [R. T. 48-50, 52-54, 61]. Gates did not know the judicial results of the previous case involving a seizure of marihuana. The informant also had given Burnett accurate information regarding Tijuana narcotic dealers in the past [R. T. 42-43, 51].

On June 11, 1965, Customs Port Investigator Prentice N. White observed a Buick automobile "cross the line". A male was driving with a female passenger. Appellant was not seen at that time. Gates was informed that the Buick arrived in the United

States at San Ysidro at approximately 10:30 p. m. on June 11 [R. T. 26-27, 31-34].

White followed the Buick to San Diego, where it was left at the Ace Parking Lot. The occupants walked away from the lot. At approximately 10:40 a. m. on June 12, 1965, Gates observed appellant, who was walking with a "Mexican-appearing gentleman". Gates was then engaged in surveillance in the Ace Parking lot vicinity [R. T. 28, 29, 31]. The vehicle was parked at that location all night on June 11 and remained there until the afternoon of June 12 [R. T. 32].

The Buick left San Diego on June 12 and went in a northerly direction with appellant as the sole occupant. Upon instructions from Gates, Burnett stopped the Buick at approximately 1:30 p. m. on June 12 [R. T. 9, 25, 26, 34]. The vehicle was stopped approximately four or five miles from San Diego. San Diego is about twenty miles from the port of entry [R. T. 9, 33].

The vehicle had one of the three license numbers that had been provided by the informant [R. T. 24, 43]. The vehicle had been under continuous surveillance from the time that it entered the United States until it was stopped by Burnett [R. T. 33].

Gates had also been informed by Customs Agent John D. Maxcy that there was marihuana in the vehicle [R. T. 32].

Burnett removed packages of marihuana from the side panels of the vehicle [R. T. 4-5, 10, 15-16]. [3/] There was no warrant of

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3/ This evidence was heard by the court and jury prior to the time that the Motion to Dismiss was made.

arrest and no search warrant [R. T. 19].

The trial Court held that there was probable cause for the arrest and probable cause for the search. The Motion to Dismiss was denied [R. T. 37, 55].

B. The Trial

On the night of June 11, 1965, United States Customs Port Investigator Prentice N. White observed a Buick automobile as it crossed the boundary line at San Ysidro, California. The vehicle was occupied by a male and a female. White believed that appellant was not in the vehicle [R. T. 57-58].

Another officer, Customs Port Investigator David F. Burnett, had received information concerning the same Buick on approximately June 10 [R. T. 3-4, 6-7, 9].

Investigator White followed the Buick to the Ace Parking lot in San Diego. The vehicle entered the parking lot at approximately 11:05 or 11:10 p. m., and the occupants left the vehicle and walked down the street [R. T. 58-59].

At about 10:30 a. m. on the following day, June 12, 1965, appellant and a Mexican-appearing individual approached the Buick at the Ace Parking Lot. They "looked the vehicle over" and talked for awhile, and then one of them, believed to be appellant, opened the door on the driver's seat. It appeared that he was searching in the front seat area [R. T. 160-61].

The other man then opened the door upon the opposite side

and watched. Then they closed the doors and walked away. Appellant on the same date waited in line with a male Mexican at the Greyhound Bus Depot, purchased a bus ticket, and gave it to the Mexican. Appellant again approached the Buick at approximately 12:30 p. m., but did not enter it [R. T. 66, 138-39, 162].

Appellant then walked up the street, came back "down and around the car", walked up another street, and entered the Chi Chi Bar at approximately 1:20 p. m. He left the bar and drove away from the parking lot in the Buick at approximately 1:30 p. m. after receiving some assistance from the parking lot attendant, who started the vehicle [R. T. 65-67, 162]. Appellant and the attendant were the only persons who approached the vehicle between the time that appellant and the Mexican-appearing individual approached it, and the time that appellant drove it away. The attendant did not approach it between 10:30 a. m., and the time that he came to start it [R. T. 163].

The Buick left the parking lot in an easterly direction and then headed to the north with officers following. Customs Agent John D. Maxcy employed a siren and flashing red light in an effort to halt the Buick, but it did not stop. Agent Maxcy radioed to occupants of another Customs vehicle, asking them to get in front of the Buick and attempt to box it in. The Buick traveled for approximately one-fourth of a mile while two vehicles were using flashing red lights. The vehicles did not have law enforcement markings, and the officers were not in uniform [R. T. 148-50, 152].

The Buick stopped after Agent Maxcy's vehicle bumped into

its rear bumper. Appellant, the driver and only occupant, was arrested at about 1:50 p.m. [R. T. 5, 65-66, 150]. The Buick was stopped in San Diego County, about four or five miles from downtown San Diego [R. T. 5-6].

Investigator Burnett removed a number of packages from the side panels of the Buick. The panels were removed by the use of a screwdriver, and the packages were not visible until the panels were removed. It was stipulated that sample quantities from the packages contained marihuana [R. T. 4-5, 10, 15-16, 73].

The packages weighed more than 104 pounds. The marihuana had a selling price of at least $1,500 in Tijuana [R. T. 13-14, 149].

A key was in the ignition of the Buick at the time that appellant was arrested [R. T. 165].

Appellant refused to state where he was living. He was asked, "Where did you get the car you were driving?". He replied, "What car? I wasn't driving any car." Everyone laughed [R. T. 68-69, 128].

Appellant testified that he had arrived in Los Angeles on May 20, having driven from Miami, Florida, to Los Angeles with one Emma Perez, who had wanted someone to help her with the driving [R. T. 78-79, 87, 121-22]. During the trip, appellant did not always register at motels in his true name, although he was not married [R. T. 88-89].

Appellant also testified that after the completion of the trip, Emma Perez told him that she would transfer the vehicle, a 1965 Pontiac, to his name, because she owed money on it and could tell

the creditor that it was no longer hers. Subsequently, according to appellant's testimony, Emma's brother-in-law, "Pedro", brought appellant to San Diego to meet one "Lalo", a Mexican who was supposed to give the Buick and $1,000 to appellant, who was to give the ownership paper to the Pontiac to "Lalo" [R. T. 89-91].

Appellant testified that after he returned to Los Angeles, "Pedro" asked appellant to do him the favor of coming to San Diego, because "Pedro" was unable to come and pick up the car, and "Pedro" told appellant to give the man the ownership paper on the Pontiac if the man gave appellant the $1,000 [R. T. 92].

Appellant also testified that "Pedro" gave appellant the ownership paper on the Pontiac and told him that he had transferred the ownership to appellant's name. Appellant later testified that Emma gave him the paper on the Pontiac and said that it was a paper about ownership of the car [R. T. 92-95, 114]. The paper actually was a fictitious bill of sale with no license number and a fictitious motor number [R. T. 131-32].

Appellant testified that he was to drive the Buick as a favor to Emma. He also testified that "Pedro" asked him to make the second trip to San Diego as a favor to "Pedro" [R. T. 92-92]. However, he also testified that Emma gave him forty dollars for the second trip to San Diego and that he was supposed to deliver the Buick to Emma in Los Angeles [R. T. 80, 113-14].

Appellant testified that on the date of his arrest, he went from the Greyhound Depot to the parking lot with "Lalo", and both of them looked at the Buick and attempted to find the key. He

testified that "Lalo" took him to the parking lot and that there had been a change in plans, as "Lalo" would not give the money, so Emma was to come down and get the $1,000 [R. T. 93-94, 96-97]. He testified that he and "Lalo" did not find the key, and that it was about 10 or 11 a. m. [R. T. 81, 97].

Appellant testified that while he and "Lalo" were at the car, he did not observe anyone go into a telephone booth. He subsequently testified that while they were there, "Lalo" made a telephone call to find out about the key, and appellant dialed the operator, left the booth, and did not hear the conversation because he was several yards away [R. T. 106-09].

Customs Agent Walter Gates testified that appellant and another man entered a telephone booth at that location, that they stepped out of the booth together, one right after the other, and that they then left the scene [R. T. 61, 159-60].

Appellant testified that after he and "Lalo" failed to find the key, "Lalo" said that he would look for the key and that appellant should call him by telephone. He testified that "Lalo" said that it would take about an hour and a half to get the key, that the telephone number was a seven-digit number, and that he did not write it down [R. T. 98, 110-11]. He also testified that he went back to the Greyhound Depot with "Lalo" and did not go inside. However, Customs Port Investigator Donald R. Carter testified that appellant and a Mexican waited in line in the Greyhound depot and that appellant purchased a bus ticket and gave it to the other man [R. T. 110, 137, 139].

Appellant testified that he left the bus depot, got something to eat, walked around, had a beer, and made telephone calls to Emma and "Lalo". He testified that he called Emma to tell her that he already had the key and that he did not get the money. He also testified that the call to "Lalo" was made after the call to Emma and that "Lalo" said that he had left the key in the car [R. T. 111-12]. Appellant testified that he found the key on the floor of the car, that they had looked at that spot before, and that he was sure that the key was not there on the first occasion [R. T. 81, 97-98].

He testified that he could not start the car, so he called Emma again and was about to call a towing service when the parking lot attendant told him that the car was started [R. T. 113].

Appellant also testified that he drove toward Los Angeles and was arrested, that he did not know that marihuana was in the automobile, and that he knew that the officers wanted him to stop but he could not do so because the brakes were not working properly. He testified that it took about the length of a city block for him to stop. Two officers testified that they operated the Buick and recalled no difficulty with the brakes, although one officer noted that it did not steer well [R. T. 82-83, 115-16, 154-58].

Appellant refused to give the name of the man who allegedly asked him to drive the car to Los Angeles. After the Court ordered him to answer, he gave the name "Pedro" [R. T. 83-84].

Appellant testified that he knew where "Pedro" lived and that he knew where Emma lived [R. T. 84, 119]. He had not mentioned "Lalo", "Pedro", or Emma to the officers [R. T. 117].

The Court instructed the jury in regard to the possession presumption under Title 21, United States Code, Section 176a [R. T. 207-10, 213].

V

ARGUMENT

A. PRELIMINARY STATEMENT

Since appellant's list of points upon appeal contains considerable repetition, appellee will not attempt to discuss these issues in the order in which they are raised by appellant.

B. THE OFFICERS HAD PROBABLE CAUSE TO SEARCH THE VEHICLE.

Appellant contends that the officers lacked probable cause to search the Buick or arrest appellant and that the motion to suppress evidence (also referred to as a "Motion to Dismiss") should have been granted upon the ground that the evidence was the product of an unlawful search.

However, it should be noted that the question of probable cause to arrest appellant may be immaterial. A vehicle may be searched where there is probable cause to believe that it contains smuggled merchandise.

Browning v. United States, 366 F. 2d 420, 422 (9th Cir. 1966).

"The rule followed in the federal courts and in a number of state courts is that if the search of a motor vehicle, although without a warrant, is made on probable cause, or on a belief reasonably arising out of circumstances known to the officer that the vehicle contains contraband, the search is valid."

79 C. J. S. p. 837.

This rule was followed by this Court in Leong Chong Wing v. United States, 95 F. 2d 903, 904 (9th Cir. 1938) (opium case).

"This search on probable cause is not to be confused with the search on probable cause justifying an arrest and incidental search, as the two are quite distinct, the right to search the vehicle being independent of the right to arrest; hence, an arrest need not precede such a search." (emphasis added).

79 C. J. S. pp. 839-40.

"The right to search and the validity of the seizure are not dependent on the right to arrest."

Carroll v. United States, 267 U. S. 132, 158 (1925).

Although probable cause to arrest was not required, it is respectfully submitted that the officers had probable cause to arrest

as well as probable cause to believe that the vehicle contained contraband at the time that the vehicle was stopped.

An arrest may be based solely upon information provided by a single reliable informant.

Costello v. United States, 324 F. 2d 260, 262 (9th Cir. 1963), cert. den. 376 U. S. 930 (1964);

Jones v. United States, 326 F. 2d 124, 128-129 (9th Cir. 1963), cert. den. 377 U. S. 956 (1964);

United States v. Salgado, 347 F. 2d 216, 217 (2nd Cir. 1965), cert. den. 382 U. S. 870 (1965);

United States v. Campos, 255 F. Supp. 853, 857 (S. D. N. Y. 1966);

People v. Guerrera, 149 Cal. App. 2d 133, 136 (1957);

People v. Garnett, 148 Cal. App. 2d 280, 284 (1957).

The informant herein had provided reliable information in a number of cases in the past. He not only had given Agent Gates accurate information in regard to Tijuana dealers, but he also provided a license number and information resulting in the seizure of a load of marihuana coming into the United States from Mexico in a vehicle. This had occurred recently, in the previous month. The informant also had given Investigator Burnett accurate information in the past [R. T. 42-43, 48-54, 61].

Since he was a previously-reliable informant, no

corroboration of his statements was required.

Jones v. United States, supra, 326 F. 2d 124, 128-29.

However, if it be assumed, arguendo, that corroboration of the informant's statements was required, there was ample corroboration here. A vehicle with one of the three license numbers did enter the United States at San Ysidro on the day following the conversation with the informant [R. T. 31-32, 34, 42-43]. Two persons left the vehicle in San Diego, and on the following day, appellant, who was not observed in the vehicle when it crossed the border, approached the vehicle with another man. After they "looked the vehicle over" and talked for awhile, they opened the doors, and one of them appeared to be searching for something in the front seat area [R. T. 58-59, 160-61]. 4/

This tended to strongly corroborate the informant's statements, indicating the obvious stratagem in which the consignee and purchaser of marihuana has someone else risk the perils of bringing the contraband across the international boundary. Appellant's general wanderings in the area after his first trip to the vehicle [R. T. 66-67], were consistent with the expected activities of a man who desires to pick up a car loaded with contraband but also wants to carefully study the area to insure that no officers in plain clothes are watching the vehicle. Appellant's purchase of a bus ticket for

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4/ Some of this evidence was received after the Motion to Dismiss (or to suppress evidence) was denied. However, when the legality of a search is questioned upon appeal, it is proper to consider evidence received at the trial after a motion to suppress evidence was denied.

Carroll v. United States, 267 U. S. 132, 162 (1925).

a man who got into a line for a bus to San Ysidro or the Border area [R. T. 139], also was consistent with the information regarding an international conspiracy. One of these corroborating facts, standing alone, might not be decisive, but all of the available evidence was consistent with the information provided by the previously-reliable informant. Consequently, the officers had ample probable cause to believe that there was contraband in the vehicle. The facts and circumstances, particularly the reliable information provided in the past and the appearance of the vehicle at San Ysidro, were more than sufficient to "warrant a prudent man in believing that the offense has been committed". 5/

Appellant cites Plazola v. United States, 291 F. 2d 56 (9th Cir. 1961), and also mentions Cervantes v. United States, 263 F. 2d 800 (9th Cir. 1959) and Cervantes v. United States, 278 F. 2d 350 (9th Cir. 1960). These cases are clearly distinguishable upon the facts. In Plazola, the information was not specific (at p. 58) and there was no showing that the informant was reliable (at p. 60). In Cervantes the informant's information was "'stale and inaccurate'".

Jones, supra, at p. 128.

Appellant also relies upon Henry, supra, 361 U. S. 98. However, in Henry, there is no indication that the informant had been previously accurate nor is there any indication that he provided definite information in that case:

5/ The language is from Henry v. United States, 361 U. S. 98, 102 (1959).

"But, so far as the record shows, he never went so far as to tell the agents he suspected Pierotti of any such thefts."

Henry, supra, at p. 99.

In the instant case, the officers had far more evidence than appears in the discussion of the facts in Henry, and they had abundant probable cause to believe that the vehicle contained contraband.

C. APPELLANT MAY NOT RAISE THE QUESTION OF TIME TO OBTAIN A SEARCH WARRANT.

Appellant contends that the officers should have obtained a search warrant:

"The time was ample, the opportunity available. No excuse was given for failure to have a search warrant issued." [Appellant's Opening Brief, p. 27].

Appellant did not raise this issue in the trial Court, so there was no reason to provide an excuse for failure to obtain a search warrant, and there was no evidence that there was an opportunity to obtain a search warrant.

Appellant made no motion to suppress evidence prior to trial. During the trial, his counsel asked a question which resulted in a question from the Court regarding its materiality. Appellant's attorney stated that he was raising the question of whether there was a warrant of arrest [R. T. 7]. Appellant later introduced

evidence in support of a motion which was described at various times as a "motion to strike" or a "motion to dismiss" [R. T. 17, 19, 35, 55]. The motion was based upon the contention that the reliability of the informant was not established, with a secondary reference to the need for a warrant [R. T. 35-36, 38]. Appellant was again referring to a warrant of arrest [R. T. 36-37]. Appellant did not raise the question of time to obtain a search warrant. Had he done so, evidence might have been introduced regarding the existence of circumstances justifying a search without a warrant and also regarding the opportunity to obtain a search warrant. June 12, 1965, was a Saturday. Agent Gates was informed that the vehicle arrived in San Ysidro at approximately 10:30 p. m., on June 11 [R. T. 31-32]. This was Friday night. In an analogous situation involving speedy arraignments before the Commissioner, this Court stated that "we are unable to say as a matter of law, that Rule 5(a) requires round the clock availability of a commissioner".

> Williams v. United States, 273 F. 2d 781, 798 (9th Cir. 1959), cert. den. 362 U. S. 951 (1960).

Had appellant raised the issue, these matters could have been explored in the trial Court.

> "Ground of objection to admission of evidence must be stated with perspicuity and particularity, so that court and opposing party may not be misled [citing cases].

"One seeking to exclude evidence should be explicit and disclose at the trial court all defects in the proposed proof which he expects to urge in case of an appeal [citing cases]."

88 C.J.S. p. 248, note 28.

D. ASSUMING ARGUENDO, THAT THE QUESTION OF TIME TO OBTAIN A SEARCH WARRANT MAY BE RAISED IN THIS APPEAL, REVERSAL OF THE JUDGMENT WILL NOT BE REQUIRED.

If it be assumed, for purposes of argument only, that the question of time to obtain a search warrant may be raised in this appeal, a reversal of the judgment would not be required in the state of the evidence in this case.

Although the vehicle was at the parking lot for a considerable period of time, there was risk of movement at all times. The officers did not know whether they had sufficient time to obtain a search warrant. There was a risk that the vehicle would be removed from the jurisdiction. Had one of the conspirators sensed the presence of the officers who participated in the

surveillance, he could have hired an innocent dupe to transport the marihuana the short distance to Mexico in an effort to salvage the vehicle and the valuable marihuana load (at least $1,500). In addition if the officers had obtained a search warrant, this would have been of great assistance to the primary conspirators (as distinguished from the original driver), who would have had an opportunity to observe the search from the neighborhood and an opportunity to escape arrest or at least to avoid the risk of facing sufficient evidence at trial. This Court has emphasized the desirability of reaching "the real rascal" in a marihuana-smuggling case.

Aguilar v. United States, 363 F. 2d 379, 381 (9th Cir. 1966).

[Also see:

Alexander v. United States, 362 F. 2d 379, 382 (9th Cir. 1966), referring to the desirability of delayed searches in smuggling cases].

There are two additional reasons for rejecting appellant's claim that the officers had sufficient time to obtain a search warrant. If the search was incidental to a lawful arrest, or if it was a border search, the rule upon which appellant relies would be immaterial. It has been indicated that where a search is based upon probable cause to believe that contraband is present, a search without a warrant is not justified unless special circumstances exist.

Corngold v. United States, 9th Cir., Sept. 29, 1966.

However, where the question is whether a search may be

subject to attack because there was an alleged delay in obtaining an arrest warrant, the delay in obtaining the warrant of arrest of immaterial.

Ward v. United States, 316 F. 2d 113 (9th Cir. 1963);

Dailey v. United States, 261 F. 2d 870, 872 (5th Cir. 1958), cert. den. 359 U. S. 969 (1959);

United States v. Sizer, 292 F. 2d 596, 599 (4th Cir. 1961);

Carlo v. United States, 286 F. 2d 841, 846 (2nd Cir. 1961), cert. den. 366 U. S. 944 (1961);

Alvarez v. United States, 275 F. 2d 299, 302 (5th Cir. 1960);

United States v. Holiday, 319 F. 2d 775, 776 (2nd Cir. 1963);

Abramson v. United States, 326 F. 2d 565, 567 (5th Cir. 1964), cert. den. 377 U. S. 957 (1964).

Since the search was incidental to a lawful arrest (as well as being a border search and a contraband probable cause search), no search warrant was required, and a delay in obtaining a search warrant would be immaterial.

The time of arrest in relation to the search would not necessarily be decisive, as the search may precede the arrest, under appropriate circumstances.

Busby v. United States, 296 F. 2d 328, 332 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962).

Furthermore, appellant asserts that he was arrested at the moment that the vehicle was stopped (Appellant's Opening Brief, p. 26).

If the search was a valid border search, there again would be no question in regard to delay in obtaining a search warrant, because a warrant is not required for a border search.

Denton v. United States, 310 F. 2d 129, 132 (9th Cir. 1962);

Landau v. United States Attorney for Southern Dist., 82 F. 2d 285, 286 (2nd Cir. 1946), cert. den. 298 U. S. 665 (1936).

The discussion of the border search issue appears under "E" below.

E. ASSUMING, ARGUENDO, THAT PROBABLE CAUSE FOR ARREST OR SEARCH WAS LACKING, THE SEARCH OF THE VEHICLE WAS A VALID BORDER SEARCH.

The trial Court did not rule upon the question as to whether the search of the vehicle herein was a border search. The trial occurred prior to this Court's ruling that the legality of a search for contraband by Customs officers away from the border "must be tested by a determination whether the totality of the surrounding circumstances . . . are such as to convince the fact finder with

reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a 'border search'."

Alexander v. United States, supra, 362 F. 2d 379, 382 (9th Cir. 1966).

Since the vehicle was constantly under surveillance by Customs officers from the time that it crossed the border until the moment that it was stopped [R. T. 33], the facts of this case clearly satisfy the test in Alexander.

While the trial Court did not rule upon the border search question, its ruling upon the motion to suppress evidence may be upheld upon the ground that the search was a border search, even though the trial Court did not rely upon that ground.

See: Diaz-Rosendo v. United States, 357 F. 2d 124, 130 (9th Cir. 1966).

Appellant contends that the search was not a border search and cites Contreras v. United States, 291 F. 2d 63 (9th Cir. 1961), and Plazola v. United States, 291 F. 2d 56 (9th Cir. 1961). However, in Contreras, there was no history of continuous surveillance from the border, a factor that was emphasized in the more recent case of King v. United States, 348 F. 2d 814, 816 (9th Cir. 1965). In Plazola, the primary search was the search of a Mercury automobile operated by the defendant's co-conspirator, Singh. This vehicle contained approximately 58 pounds of marihuana, while the

appellant's vehicle contained one marihuana seed. It would have been an extraordinary proposition to argue that the search of the Mercury was a border search, as there apparently was no evidence that the Mercury recently crossed the border. 6/ While the opinion discusses the search of the appellant's vehicle, which did cross the border, it may be questioned whether it was essential to determine the validity of the search of that vehicle, because the marihuana seed was discovered after the officers had probable cause for appellant's arrest (Plazola, supra, at p. 62).

F. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

Appellant contends that the evidence was insufficient to support the verdict and judgment and that appellant's motion for judgment of acquittal should have been granted. Appellant cites Cervantes, supra, 263 F. 2d 800. Cervantes is concerned with the question of probable cause to arrest. Since the primary evidence (the contraband) in that case should have been suppressed, the remaining evidence would clearly have been insufficient.

6/ This information appears in Appellee's Brief in Plazola, No. 17132, p. 4. The Mercury was observed by officers north of the intersection of Highway 80 and Highway 111.

It is a proper practice to refer to appellate briefs in order to determine whether a particular question was raised upon appeal, e. g., Murphy v. Waterfront Comm'n., 378 U. S. 52, 65-66 (1964); Karrell v. United States, 247 F. 2d 706, 709-10 (9th Cir. 1957).

However, in the instant case, the marihuana was lawfully seized from a vehicle operated by appellant, the sole occupant [R. T. 4-5, 9, 15-16].

The jury heard appellant's version of the incident. His story was completely unreasonable, if not absurd, and his testimony was clearly impeached upon material matters. According to appellant's version, he and "Lalo" went to the parked vehicle and unsuccessfully attempted to find the key, after which "Lalo" said that he would look for the key and added that appellant should call him by telephone. He testified that "Lalo" later said that he had left the key in the car and that appellant subsequently found the key on the floor of the car. He was certain that the key was not there at the first time that he was there [R. T. 97-98, 111].

However, Investigator Hanson testified that appellant and the attendant were the only persons who approached the vehicle between the time that appellant and the other individual approached it, and the time that appellant drove it away. He also testified that the attendant did not approach the vehicle between 10:30 a. m. and the time that he came to start it [R. T. 163]. Appellant and the Mexican-appearing individual approached the vehicle at approximately 10:30 a. m. [R. T. 161]. From this evidence, it was impossible for anyone to leave the key in the vehicle without being observed, since the vehicle was continuously in Hanson's view [R. T. 163]. At this point appellant's entire narrative of events collapses in the light of the accepted facts, i. e., Hanson's testimony.

Evidence upon appeal is viewed in the light most favorable

to the prevailing party in the trial court.

Stein v. United States, 337 F.2d 14, 16 (9th Cir. 1964), cert. denied, 380 U.S. 907 (1965);

Mosco v. United States, 301 F.2d 180, 181 (9th Cir. 1962), cert. denied, 371 U.S. 842 (1962).

Another major weakness in the defense was the fact that appellant claimed that "Lalo" gave him a seven-digit telephone number and told him to telephone "Lalo" but appellant did not write down the number [R.T. 98, 110]. The marihuana was worth at least $1,500 in Mexico [R.T. 149]. According to appellant's version, the success of the entire conspiracy was left to stand or fall upon appellant's ability to remember a seven-digit telephone number, so that he could find out about the key to the vehicle. This is completely unreasonable, to say nothing of the oddity of a plan whereby appellant would telephone "Lalo" instead of "Lalo" telephoning appellant at a pay telephone when "Lalo" was ready.

There were other serious weaknesses in the defense. Appellant testified that he was to pick up the Buick as a favor for Emma. He also testified that he was asked by "Pedro" to make the second trip to San Diego as a favor to "Pedro" [R.T. 91-92]. However, he testified that Emma gave him forty dollars for the second trip to San Diego and that he was supposed to deliver the Buick to Emma in Los Angeles [R.T. 80, 113-14].

Appellant's refusal to name one of his chief companions in the venture was a convincing demonstration of the hollowness of

his position:

"Q. Mr. Rodrigues, referring to the man who is said to have told you to drive the car to Los Angeles, what was that man's name?

"A. I refuse to answer." [R. T. 83].

After the Court compelled the answer, appellant provided the name of "Pedro" [R. T. 84].

Another significant factor was appellant's act of waiting in line at the bus depot and purchasing a bus ticket for his companion [R. T. 139]. Appellant's motive in falsely testifying that he did not even enter the bus depot [R. T. 110] is apparent, because the act of purchasing a bus ticket for "Lalo" (or whatever his name may have been) was inconsistent with appellant's claim that he was merely following the instructions of others, including "Lalo".

In addition to the inconsistencies involving the purpose of appellant's trip and the purchase of the bus ticket, appellant was contradicted by others upon the questions whether he remained in the telephone booth at the lot until "Lalo's" conversation was completed [R. T. 106-09, 159-60]; whether he continued for about one-fourth of a mile while the officers were attempting to stop him by using flashing red lights from two vehicles [R. T. 116, 150]; and whether the brakes of the vehicle were operating properly [R. T. 115-16, 155-58].

There were other weaknesses in the defense. Appellant refused to tell the officers where he was living [R. T. 69]. He joked about the incident of the arrest and said that he was not

driving any car [R.T. 68-69, 128], which was certainly not a normal reaction for a person arrested in a case involving a huge quantity of marihuana. He admitted recent use of an alias while registering at motels [R.T. 89, 121-22]. Appellant's claim that Emma Perez wanted to transfer a 1965 Pontiac to his name is not reasonable [R.T. 89].

In Eason v. United States, 281 F.2d 818 (9th Cir. 1960), marihuana and seconal and amphetamine tablets were found in a vehicle in which two men entered the United States. Both men denied knowledge of the presence of the contraband. They testified concerning their trip from Inglewood, California, to Tijuana, and their activities in Tijuana and return to the border. The opinion contains no hint of any contradiction in their testimony. The only other evidence was the fact that an officer's suspicion was aroused because the defendants appeared to be nervous and because of the defendants' manner in answering questions. The convictions were affirmed.

In Aguilar v. United States, supra, the defendant was caught in a vehicle entering the United States from Mexico with about 98 pounds of marihuana. There, as here, none of the marihuana packages were visible without prying. The defendant claimed to have borrowed the vehicle. He employed the usual "missing man" defense. Whereas the missing people in the instant case were "Pedro", "Lalo", and "Emma Perez", their counterparts in Aguilar were "Salvador" and "Morales". Unlike the instant case, there appear to have been no obvious contradictions

in Aguilar's story. This Court held that the evidence was sufficient:

> "There was no direct evidence or admission of knowledge. But out of Aguilar's own words, first, his alibi on arrest and, second, his testimony which followed the line of his alibi, the trial judge, in the full setting here, was entitled to believe the story 'fishy' and to draw affirmative inferences of knowledge. Details about Salvador and Morales were rather unsatisfactory. Also, the court could have concluded that the story about intending to go to his cousin's house was hand made."

Aguilar, supra, at 380-81.

It is respectfully submitted that the evidence in the instant case was more than sufficient to sustain the conviction.

Furthermore, it is questionable whether appellant may raise this issue upon appeal, having failed to renew the motion for judgment of acquittal after presenting evidence following the denial of the motion for judgment of acquittal at the conclusion of the Government case [R.T. 56, 167, 170].

McDonough v. United States, 248 F.2d 725, 727 (8th Cir. 1957).

G. THE COURT'S INSTRUCTION UPON THE STATUTORY POSSESSION PRESUMPTION WAS NOT ERRONEOUS.

The trial Court instructed the jury in regard to the statutory presumption arising from possession in marihuana cases (21 U.S.C.A. 176a) [R.T. 207-10, 213]. Appellant contends that this instruction was erroneous because it was "misleading, garbled and unintelligible"; it left it to each juror to convict or acquit in accordance with his own particular notion as to what kind of an explanation would be acceptable; and it was incomplete upon the question whether mere occupancy in the vehicle would establish the presumption (Appellant's Opening Brief, pp. 47, 51, 56).

Appellant relies upon Chavez v. United States, 343 F.2d 85 (9th Cir. 1965). Chavez holds that a similar statutory presumption under 21 U.S.C.A. 174 is a rebuttable presumption. In Chavez, the trial Court erroneously instructed the jury that the defendant's denial of knowledge that the drug was illegally imported would be insufficient to overcome the presumption (at p. 87). In the instant case, the trial Court instructed the jurors that if they believed "the testimony of the defendant to the effect that he did not know that it had been imported from Mexico", then "you should acquit him" [R.T. 210]. Thus the jury was instructed that the presumption was rebuttable and the requirements of Chavez were fully complied with by the Court.

The instruction was not misleading, garbled, or unintelligible. It closely followed the model instructions in 27 F.R.D.

(Instructions 24.08 and 24.09, pp. 168-69), with minor additions and deletion of some material at the suggestion of appellant's counsel [R.T. 102-03, 207-10, 212-13].

Appellant also relies upon dictum in Chavez to the effect that the statutory words, "to the satisfaction of the jury", provide nothing in the way of a standard or guide for the jury, because it is left for each individual juror to convict or acquit in accordance with his particular notion as to what kind of an explanation would be acceptable.

The use of the statutory phrase, "to the satisfaction of the jury", in jury instructions, is not an unusual practice. Jurors were instructed in accordance with this language in Yee Hem v. United States, 268 U.S. 178, 182 (1925); Claypole v. United States, 280 F.2d 768, 770 (9th Cir. 1960); Klepper v. United States, 331 F.2d 694, 702, note 9 (9th Cir. 1964); and Quiles v. United States, 344 F.2d 490, 492 (9th Cir. 1965). The phrase appears in the set of model jury instructions appearing in 27 F.R.D. (Instruction No. 24.08, p. 168), and it also appears in the 1965 Manual on Uniform Jury Instructions in Federal Criminal Cases (Instruction No. 17.01-1, 36 F.R.D. 609). It has been held that failure to instruct the jury in accordance with the second paragraph of 21 U.S.C.A. 174 would have been improper under the facts of Agobian v. United States, 323 F.2d 693, 695 (9th Cir. 1963), 375 U.S. 985 (1964).

Furthermore, since appellant did not object in the trial Court to the manner in which the phrase, "to the satisfaction of the jury", was employed in the instructions [R.T. 102-106, 213-14],

he may not object at this time. "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Rule 30, Federal Rules of Criminal Procedure

(emphasis added).

Assuming, arguendo, that the instruction erroneously left the matter to the individual notion of each juror, and assuming that failure to object does not act as a bar to consideration of the new issue in this Court, it is respectfully submitted that any error in this respect would be harmless. Appellant states that it would be left to each individual juror to decide whether the defendant's explanation of possession was satisfactory. However, there would not be a necessity for such a decision, because there was no explanation of possession by the defendant. The presumption involves a knowing possession.

Delgado v. United States, 327 F. 2d 641, 642

(9th Cir. 1964).

Such a possession was denied by appellant [R. T. 83]. "Defendant's denial of knowledge of the contents of the vial and whether its contents were imported was no explanation of possession."

United States v. Kapsalis, 313 F. 2d 875, 878

(7th Cir. 1963), cert. denied,

374 U. S. 856 (1963).

Appellant also contends that the instruction herein was

incomplete upon the question whether mere occupancy in the vehicle would establish the presumption. The instruction was not incomplete. The jury was informed five times that the presumption applied to "knowledgeable" possession [R. T. 208-10]. In two additional statements, the Court placed great emphasis upon the question of knowledge while instructing the jury [R. T. 209, 212-13]. Consequently, the jurors were thoroughly informed that mere occupancy of the vehicle would not be sufficient.

Furthermore, appellant cannot complain of the failure to give instructions, as he did not comply with Rule 18. 2(d) of the rules of this Court: "When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial." (Emphasis added.)

In order to obtain review of the refusal to give an instruction, the record must show the instruction that was requested.

4A C. J. S., p. 1300.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON
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